

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KIMBERLY MAIN, an individual, on behalf
of herself and all others similarly situated,

Plaintiff,

v.

WAL-MART STORES, INC., and DOES 1
through 50, inclusive,

Defendants.

No. C 11-01919 JSW

**ORDER DENYING MOTION TO
DISMISS AND CONTINUING
CASE MANAGEMENT
CONFERENCE**

ROBIN NELSON, an individual, on behalf of
herself and all others similarly situated,

Plaintiff,

v.

WAL-MART STORES, INC., and DOES 1
through 50, inclusive,

Defendants.

No. C 11-02001 JSW

**ORDER DENYING MOTION TO
DISMISS AND CONTINUING
CASE MANAGEMENT
CONFERENCE**

MARYLYNN GRIKAVICIOUS, an
individual, on behalf of herself and all others
similarly situated,

Plaintiff,

v.

WAL-MART STORES, INC., and DOES 1
through 50, inclusive,

Defendants.

No. C 11-02893 JSW

**ORDER CONTINUING CASE
MANAGEMENT CONFERENCE**

LOURDES R. LANDEROS, an individual, on
behalf of herself and all others similarly
situated,

No. C 11-02659 JSW

Plaintiff,

v.

**ORDER CONTINUING CASE
MANAGEMENT CONFERENCE**

WAL-MART STORES, INC., and DOES 1
through 50, inclusive,

Defendants.

TINA BAUER, an individual, on behalf of
herself and all others similarly situated,

No. C 11-03233 JSW

Plaintiff,

v.

**ORDER CONTINUING CASE
MANAGEMENT CONFERENCE**

WAL-MART STORES, INC., and DOES 1
through 50, inclusive,

Defendants.

Now before the Court are the motions to dismiss filed by defendant Wal-Mart Stores, Inc. (“Defendant”). The Court determines that these matters are appropriate for disposition without oral argument and are deemed submitted. *See* Civ. L.R. 7-1(b). Accordingly, the hearing set for November 4, 2011 is HEREBY VACATED. Having carefully reviewed the parties’ papers and considering their arguments and the relevant authority, and good cause appearing, the Court hereby DENIES Defendant’s motions to dismiss for the reasons set forth below.

Defendant moves to dismiss the “claims” by plaintiff Kimberly Main and Robin Nelson (“Plaintiffs”) for *cy pres* recovery. Plaintiffs each bring a cause of action for violation of California Civil Code § 1747.08, the Song-Beverly Credit Card Act of 1971 (“Song-Beverly Credit Card Act”). In their prayers for relief, Plaintiffs each seek an award for themselves and the purported class they seek to represent of the civil penalty pursuant to California Civil Code § 1747.08 and “for distribution of any moneys recovered on behalf of the Class of similarly

1 situated consumers via fluid recovery or *cy pres* recovery where necessary to prevent Defendant
2 from retaining the benefits of their wrongful conduct.” Defendant argues that *cy pres* is
3 considered a form of equitable relief and the Song-Beverly Credit Card Act only authorizes
4 recovery of statutory damages by private plaintiffs.

5 In *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir.
6 1990), the Ninth Circuit held that *cy pres* or a fluid recovery may be considered by courts to
7 distribute unclaimed funds after a valid judgment for statutory damages has been entered
8 against a defendant. The court merely rejected the district court’s specific application of *cy pres*
9 because the proposed distribution of funds was to a group too remote from the plaintiff class
10 and there was no reasonable certainty that any class member would have benefitted. *Id.* at
11 1308.¹

12 The Court need not determine at this time whether distribution of any unclaimed
13 statutory damages to the purported class through *cy pres* would be appropriate. The issue of *cy*
14 *pres* distribution is premature until a class is certified, damages are awarded, *and* there are
15 funds that remain unclaimed. See *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 966 (9th Cir.
16 2009) (finding *cy pres* distribution “becomes ripe only if entire settlement fund is not
17 distributed to class members” and declining to determine propriety of *cy pres* at that time).
18 Accordingly, the Court DENIES Defendant’s motions to dismiss. This Order is without
19 prejudice to Defendant challenging the use of *cy pres* distribution if and when this issue
20 becomes ripe.

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26 ¹ Defendant relies on *Haug v. Petsmart, Inc.*, 2010 WL 2925096 (E.D. Cal. July 23,
27 2010). In *Haug*, the court characterized the plaintiff’s request for *cy pres* relief as damages,
28 and as such, struck the plaintiff’s request for “*cy pres* damages” as unauthorized by the
Song-Beverly Credit Card Act. The Court disagrees that *cy pres* funds are a form of
damages, and finds instead, that they are a form of distribution of damages. Therefore, the
Court finds the reasoning of *Haug* unpersuasive.

1 In addition, the case management conferences, set in all related matters, is HEREBY
2 CONTINUED to December 16, 2011 at 1:30 p.m.

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4 **IT IS SO ORDERED.**
5 Dated: November 1, 2011


JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE